

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No: 150857

Court of Appeals No. 314579

V

Circuit Court No. 11-565-FC

YUMAR A. BURKS,

Defendant-Appellant.

PEOPLE'S SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the trial court abused its discretion by denying Defendant's request for a jury instruction under MCL 750.136b(3)(a)(Child Abuse Second Degree – Reckless Act) when the evidence would not have supported a conviction under this theory?

Plaintiff - Appellee answers, "No."
Defendant – Appellant answers, "Yes"

II. Whether child abuse second degree under MCL 750.136b(3)(a) (Reckless Act) is a necessarily included lesser offense of child abuse first degree?

Plaintiff - Appellee answers, "No."
Defendant – Appellant answers, "Yes"

COUNTER STATEMENT OF APPELLATE JURISDICTION

This is an appeal of right following a jury trial conviction in the 30th Circuit Court on September 25, 2012 and sentencing, which occurred on October 24, 2012. The Court of Appeals affirmed Defendant's convictions in an opinion dated December 2, 2014. Defendant filed the present application for leave to appeal on January 16, 2015.

On June 5, 2015, this Court directed the parties to file supplemental brief addressing whether the trial court erred in refusing the defendant's request for a jury instruction on the offense of second-degree child abuse. This Court directed the Circuit Court to appoint Defendant counsel and the parties to file briefs within 42 days of the Circuit Court's appointment. On June 12, 2015, the Circuit Court appointed counsel to the Defendant. Both Parties briefs are due on or before July 24, 2015.

COUNTER STATEMENT OF FACTS

Defendant was convicted of Felony Murder¹ and Child Abuse in the First degree² following a six-day jury trial. The murder victim was Defendant's six-month old son, Antonio Yumar Burks.

The trial began on September 18, 2012 with the testimony of paramedic **Nathan Gates**. On March 25, 2011 at about 10:30 a.m., he was dispatched to 1261 Deerpath, in East Lansing on a report of an infant who was not breathing. When he arrived in an ambulance Mr. Gates took over CPR from two police officers who been working on the infant. (Tr. 9/18/12, pp 4-10) He picked up the child and went immediately to the ambulance. He continued CPR while he carried the child to get him to a hospital as quickly as possible. The child had no measurable electrical activity in the heart and was not breathing. He was six months old and weighed around 20 pounds. Mr. Gates noticed that the child was very cold and had bruises on his slightly distended abdomen. He never got any response from the child. (Id. pp 11-14). Mr. Gates testified that it would be important to know about accidents or medical problems of the child. Mr. Gates spoke with Defendant at the hospital and he told Mr. Gates that he checked the child at 2300 hours and the child was fine. He did not mention any recent accidents or health history. (Id. pp 12-13)

Paramedic **Peter Counseller** also responded to the same call. He had been with the East Lansing Fire Department for 18 years and was the most experience first –

¹ Contrary to MCL 750.316-B

² Contrary to MCL 750.136B2

responder that day. (Id. pp 27, 38) When he arrived at the scene, he saw Medic Gates coming down the stairs from the home with a limp, lifeless African-American infant in his arms. The child did not appear to be spontaneously breathing. They initiated procedures for a pediatric arrest in the ambulance. The child was asystole³. They tried to open an airway and also tried to start an IV. They were unable to do these procedures. The child never had a heartbeat and was cold. He had never seen a child so cold in all his 20 years. He noticed more than 10 bruises on the child's distended abdomen. When the diaper was off Mr. Counseller noticed that the baby was freshly powdered and completely dry. He found this to be odd because when someone dies the bowel and bladder releases. Instead of a dirty diaper Mr. Counseller found the opposite. (Id. pp 27-36) Mr. Counseller also noticed that the child's fontanel, which he described as the soft spot on an infant's skull, was sunken, even when the child was laying horizontal. He stated that this, along with the cold body temperature and other signs, such as lack of pulse, heartbeat and cloudy eyes indicated the child was dead. (Id. pp 33-42) He also observed that the child's frenulum, which is tissue that connects the top lip to the gum, was torn. (Id. p 39) None of the injuries which Mr. Counseller observed were caused by the efforts of the ambulance crew while performing CPR on the child.

Two East Lansing Police officers were the first responders on the scene. **Lt. Scott Wriggelsworth** arrived at about the same time as Officer Scott Sexton. (Id. p 66) This was a two story apartment building and Defendant was in the second floor window above the door screaming at the police. The front door was closed and locked. Lt. Wriggelsworth tried unsuccessfully to kick down the door open, but it was eventually

³ "Asystole" means no pulse.

opened by a nearby maintenance worker. (Id. pp 64-66) He ran upstairs and saw the mother, Sheretta Lee on the stairs. The baby was on a mattress on the floor and Defendant was on top of him, giving him full adult CPR chest compressions. Lt. Wriggelsworth pulled Defendant away and he began doing two-finger compressions while Officer Sexton did breaths. (Id. pp 69-72) The baby was cold to the touch, had no color, and appeared to be dead. (Id. p 73) The father was in the bedroom “going crazy”, yelling at the top of his lungs and destroying the room. He was tearing pictures off the walls and ripped down the blinds. Officer Sexton calmed him down. (Id. p 74) When the medics arrived three to four minutes later, they grabbed the child and were gone. Defendant did not say anything to Lt. Wriggelsworth about an accident involving the child. (Id. pp 74-75, 85)

Officer Sexton took Defendant to the hospital. (Id. p 79) There were two other young children present and Sheretta Lee found someone to watch them. She was given a ride to the hospital later. Ms. Lee had called 9-1-1. (Id. pp 79-82) Lt. Wriggelsworth noticed a lack of emotion from the mother. (Id. p 87)

Lt. Wriggelsworth regarded the apartment as a crime scene. He had the scene secured until the police obtained consent to search. (Id. pp 78, 81) Lt. Wriggelsworth testified that the dispatchers are trained to give CPR instructions over the phone. He also noted that the temperature of the apartment was not cold. (Id. pp 83-84)

Officer Sexton testified that when he arrived at the Deerpath apartment Defendant was hanging out of the top window frantically waving his arms. (Id. pp 95-96) He too saw Defendant doing adult CPR on the baby’s chest. He and Lt. Wriggelsworth performed infant CPR, with Officer Sexton doing the breathing. The baby was very cold.

Officer Sexton saw injuries which were not where Defendant had his hands when he was doing CPR. He saw bruising on the baby's cheeks and around the naval area and a gouge the size of a penny on the left rib cage. (Id. pp 98-104) While they were doing CPR they were distracted by Defendant who was punching holes in the drywall. (Id. p 106)

Officer Sexton drove Defendant to the hospital behind the ambulance. Defendant sat in the front seat with him. Defendant was upset, screaming into his phone and crying. The most Officer Sexton could get from Defendant was that he gave the baby a bath and bottle around 11 and put the baby to bed. Defendant did not say anything about the baby being under water. (Id. pp 107-109)

While at the hospital, Officer Sexton was informed privately by a nurse and hospital security that because of the temperature of and injuries to the baby they wanted Defendant to stay in the waiting area. (Id. p 110) Later, Officer Sexton and Defendant were allowed in the treatment room. They watched for at least 15-20 minutes while medical personnel worked on the baby. Defendant did not mention any health information to the medical staff. When Defendant was informed that Antonio was dead he began yelling and struggling with Officer Sexton and the security staff. It took Officer Sexton and 4-5 security guards to restrain Defendant. He was strapped to a gurney until he calmed down. He was eventually released and waited in a room with the mother Sheretta Lee for about 10-15 minutes. (Id. p 112-114, 127)

The doctor showed Officer Sexton injuries on Antonio's body: bruising on both cheeks, 10-12 bruises in the naval area, a small gouge on the left rib cage, a bruise on his back and a small laceration on the back of his head. The doctor also showed Officer

Sexton Antonio's mouth where the tissue that attaches the top lip to the gums had been ripped and detached from the gum. (Id. pp 115-116)

Officer Sexton spoke to Sheretta Lee at the hospital. Officer Sexton gave Ms. Lee a ride from the hospital to the police station. She was coherent, cooperative and answered questions. She also gave consent for the search of the residence. (Id. pp 117-118)

Detective **Candace Ivey** took photos of the two – story townhouse where the incident occurred. She described the layout and what she observed. She saw a baby bath tub inside the regular bath tub. There was no water in either tub. She did not find any evidence of blood or body fluids. (Id. pp 133-141) She took the photos between 4 and 5 p.m. on March 25, 2011. (Id. p 152) Detective Ivey noted that the temperature in the home was set at 73 degrees and it felt like 73 degrees. She also noted that the bedroom window was open. (Id. pp 147-148)

Brianna Nielson also testified on the first trial day. She was an 18 year old student who knew Defendant through a mutual friend. She babysat for a child at the apartment next to Defendant's home. (Id. pp 19-20) She knew the two little boys but didn't know about the baby. Defendant was like a 'big brother' to her and she talked to him. (Id. pp 20-22) At the time of the incident she was 16 and a student at East Lansing High School.

On March 24, 2011 she was on the school bus after school and she talked to Defendant. She got out of school at 2:55 and arrived home around 3:30. She called Defendant and he said he would call her back, but he never did. (Id. pp 22-23) She called him again several hours later. It was still light outside. He answered the phone

and he was crying. Defendant said something was wrong and he had to get to the hospital and he hung up. He was very frantic, crying and hard to understand. (Id. p 24) She called him back multiple times but he did not answer.(Id. p 25) She reviewed the phone records with Detective Phelps and had no reason to dispute the times of her calls as contained in those records.⁴ (Id. p 26)

On the second day of trial, the jury heard from **Dr. Martin Romero**, a board certified emergency room physician. Dr. Romero was the attending emergency room physician on March 25, 2011 when Antonio Burks was brought to Sparrow Hospital. (Tr. 9/20/12, pp 4-9) When he first saw Antonio he had no movement, no respiration and no pulse. Antonio was receiving CPR and his staff assumed care of him from the EMS squad. (Id. pp 10-12) It would have been important to know information about medications, injuries or illnesses of the child because it can affect how the trauma is managed. (Id. pp 11-12) The father was in the treatment room. If he had told Dr. Romero about an accident he would have listened to him. Defendant said nothing about an accident. (Id. p 21)

Dr. Romero described injuries he found on Antonio. On his head Dr. Romero found a healing abrasion. He found multiple bruises and abrasions on the face. An oral examination revealed that the tag of skin between the top lip and gum, called the frenulum, was torn. There was bruising on the gum line. There were very small areas of bruising on the neck. Dr. Romero saw "Cullen's sign" which is a purple coloration

⁴ According to cell phone records obtained by Sgt. Phelps, there was a call from Ms. Nielson to Defendant on March 24, 2011 at 3:26 which lasted for 14 seconds. Ms. Nielson called Defendant again that day at 5:05 p.m. and the call lasted 585 seconds. Ms. Nielson called Defendant again that day at 6:18 p.m. and 9:36 p.m. and both calls went to voicemail. (Tr. 9/20/12, p 94)

around the umbilicus which indicates internal bleeding and is seen in motorcycle accidents. There was extensive bruising on the abdomen. The bruising on the abdomen was “more recent”. On the arms there were a couple areas of resolving bruising. Dr. Romero did not observe any external genital trauma but found extensive bruising on both legs. (Id. pp 14-15, 31-33)

Dr. Romero noted that Antonio’s core temperature was so low that it didn’t register on the ER thermometer, which goes down to 92 degrees. (Id. pp 17, 55) Anything lower than 92 is “inconsistent with life”. (Id. p 55) He tried unsuccessfully to warm Antonio. They worked on him for 40 – 60 minutes but never saw a response from Antonio. Based on this lack of responsiveness, lack of corneal reflection, the beginning of opacification of the corneas, and Antonio’s low temperature, Dr. Romero decided to stop trying to resuscitate him. Based on these factors, Dr. Romero estimated that Antonio had been without circulation for a prolonged period of time, which he estimated at from 4-6 hours up to 12 or even 24 hours. (Id. pp 21-25, 53) At some point, Dr. Romero concluded that the child had internal injuries, but he did not use any equipment to evaluate the child’s internal organs because they had been unable to resuscitate him. (Id. p 46) Rigor had not set in yet. That usually takes from 12 – 72 hours to occur. (Id. p 45)

Dr. Romero testified that the injuries he saw on Antonio were inconsistent with injuries caused by inappropriately administered CPR. Such injuries are most commonly broken ribs. He had never seen abdominal injuries from inappropriate CPR and he testified that such injuries were unlikely because the abdomen has enough “bounce” that it doesn’t cause injury. Abdominal injuries are caused by “blunt force trauma”. The

injuries to the face and to the frenulum were inconsistent with any form of CPR. (Id. pp 34-36) It was Dr. Romero's opinion that it was very unlikely that the injuries he saw were caused by improper administration of CPR. (Id. p 47)

Dr. Romero saw no other bodily fluids around Antonio's nose or mouth. He did not see any feces or urine on Antonio or in his diaper. He testified that stool in the rectal vault and urine in the bladder will be expelled at the time of death. He noted that at the time the EMS found Antonio his diaper was clean, which showed that the child had been cleaned. Dr. Romero characterized that as "atypical". (Id. pp 37-39)

Travis Parris testified that he knows Defendant as a neighbor from the Deerpath apartments. Defendant lived a "10 second" walk away from Mr. Parris. They talked about games and played video games together at each other's homes. (Id. pp 58-62) On March 24, 2011 Defendant was at Mr. Parris' home playing video games. No one was with Defendant. It was daylight when Defendant was there, around 5 p.m. Defendant left after a couple hours to check on his baby. Mr. Parris told him to do it. Mr. Parris had three children and said he would not leave his own baby alone. It was daytime when Defendant left, around 7 or 8. Mr. Parris was not really sure of the times. He expected Defendant to come back and finish their game. He kept calling Defendant. (Id. pp 63-67) Mr. Parris went over the phone records with a police officer and they accurately reflected the times.⁵ (Id. p 86)

⁵ According to the testimony of Detective Phelps, the first call between the two occurred at 11:46 a.m. when Travis Parris called Defendant and the call went into voice-mail. Defendant tried to call Mr. Travis at 1:22 p.m. and 1:45 p.m. with no answer. At 3:07 Mr. Parris called and spoke to Defendant for nine seconds. There was a succession of very brief conversations prior to 3:30 p.m. Between 3:30 and 5:50 there were no calls between Defendant and Mr. Parris. At 5:50 Defendant called Mr. Parris and the call lasted 156 seconds. This was the longest call. Defendant called Mr. Parris at 7:30, 9:27, 10:40, 11:45 and 1:35 a.m. Mr. Parris called Defendant at 10:00, 11:44 and 1:29 a.m. (Tr.9/20/12 pp 95-99)

When Defendant came back to Mr. Parris' home, it was around 12 that night. It was dark out. When he came back he didn't play games, he just sat on the couch. This was not normal. Mr. Parris thought Defendant stayed until his wife got home. The baby was not with him (Id. p 63) Mr. Parris believed that Sheretta arrived home around 2 or 3 a.m. and that Defendant stayed at Mr. Parris' home for another 3-4 hours. (Id. pp 77-78)

Defendant had brought the baby to Mr. Parris' home, but not on the 24th. Mr. Parris had seen Antonio three times and never saw bruises on him. He said Antonio was not a happy baby. (Id. pp 74-82) He saw the medics carry the baby out of the house and the baby was not moving. (Id. p 84)

The jury next heard from **Sheretta Lee**, former wife of Defendant and mother of the victim, Antonio Burks. Ms. Lee married Defendant on February 27, 2010. Antonio was not a planned baby and Defendant wanted Ms. Lee to have an abortion, but she refused. They decided together to have Antonio. He was born on August 26, 2010. She has two other sons who are not Defendant's children. (Id. pp 102-105)

When Antonio was born Ms. Lee was the only one working. She worked at Quality Dairy and did not take time off after the birth. (Id. pp 105-106) She became a Certified Nurse Assistant and in March took a job in a nursing home in Dimondale. She worked from 3 to 11 p.m.. Ms. Lee did not want to overburden Defendant with the older two boys, so she took them to daycare which was financed by DHS. Defendant watched Antonio. Ms. Lee dropped the boys off at day care on her way to Dimondale and her mother picked them up at 4:30 and kept them at her house. Ms. Lee then picked the boys up from her mother on her way home from Dimondale and the three of them got home around midnight. (Id. pp 107-111)

Prior to Antonio's death, Defendant had talked to Ms. Lee about the stress he was feeling. He was frustrated that he couldn't find a job and provide for the family. Several weeks before Antonio's death, Defendant was driving her to work at Quality Dairy. Ms. Lee, Antonio and her son Keith were in the car. Defendant was talking about dropping her and the kids off and driving the truck off a cliff. He was acting wild, swerving the car and talking in a loud, angry voice. Ms. Lee was shaking when she got out of the car at her job. She was going to take the boys out of the car but Defendant drove off, leaving skid marks. She was terrified for the children and her supervisor called the police. The police followed up and the children were not harmed. (Id. pp 112-116)

Ms. Lee noticed the cut on Antonio's head and she thought it was an accident caused by laying Antonio on one of the other boys' blocks.(Id. pp 117-118, 176) Defendant began giving Antonio hickies on his cheeks when he was three months old. She told him not to do that but Defendant said he was just playing with him. No one else did that to Antonio's cheeks. Prior to his death, Ms. Lee had never seen Defendant slap or punch Antonio. She was not aware of Antonio falling off a bed. (Id. pp 119-120)

Ms. Lee showed Defendant how to bathe, feed and change the baby. Antonio had an infant tub. She told Defendant that babies have lots of needs and explained about how to rock him, help him with gas, rub his back and check to see if he's wet. There were times when Antonio would cry and Defendant would say "let him cry, he is fine" and Ms. Lee would tell him that wasn't true and that the baby had needs. Defendant would get frustrated when he tried to get Antonio to stop crying and he would say "I can't do this". At that point, Ms. Lee would take over or she would ask a friend to

watch the baby. Antonio cried a lot and she and Defendant argued about money a lot. They had financial problems. (Id. pp 122-126)

On the morning of March 24, 2011 Ms. Lee got up and fed everyone breakfast. She left for work at 2:00 p.m., taking the two older boys with her to drop off at day care. Before she left for work Defendant expressed his frustration with the “temp” employment agency he was working with and punched holes in the walls. He told Ms. Lee ‘that could have been you’. He was angry, but became calmer. She asked him if he was okay to care for Antonio and he said he was. That was the last time she saw Antonio alive. She dropped the older boys off at day care and went to work. (Id. pp 127-130) Ms. Lee left work at 11:00 p.m. and picked up her two sons. When she got home she called Defendant to have him come out and help her carry in the sleeping boys. He grabbed Jayden and rushed into the house, and put Jayden in bed without taking off his coat or shoes. This was unusual. (Id. pp 133-135) Defendant warned her not to wake the baby. She described his mood as “panic”. (Id. pp 136-137) She did not touch Antonio at that time. (Id. p 163) Antonio was on the mattress on the floor in the dark bedroom, with covers on him.(Id.) Defendant said he was going to Travis’ house to finish his game. Ms. Lee was tired and went to bed. (Id. p 138)

Ms. Lee heard Defendant pacing in the room around 3:00 a.m. and she thought he was taking care of Antonio. She woke up around 8 and realized Antonio wasn’t crying. She heard the other kids downstairs and assumed Antonio was downstairs with them. She went back to sleep and woke up around 10. Defendant was in the room. Ms. Lee touched Antonio and he was very cold. (Id. pp 140-144)

When she felt how cold Antonio was Ms. Lee went into shock. She thought he might have passed away. She “froze”. Defendant turned him over and lifted his onesie. Antonio had bruising all over his body. Ms. Lee had bathed him before going to work the previous day and he wasn’t bruised then. (Id. pp 150) There was nothing wrong with him then. She was confused. Defendant was screaming and yelling. She called 9-1-1. They were telling her how to do infant CPR but Defendant was doing adult CPR. She told him to stop because he was going to crush Antonio’s ribs. She told Defendant to use two fingers. He didn’t listen. The bruises were there before Defendant tried to do CPR. (Id. pp 152-154) The police took over CPR when they arrived. (Id. p 155) The medics came and took Antonio. She had seen people who passed away due to her work. She knew he was gone; she didn’t think he was alive. (Id. pp 155-156) Ms. Lee got her mom to watch the older boys. When she arrived at the hospital the nurse told her she was sorry that her son had passed away. Defendant was in restraints. She was never alone with him at the hospital. (Id. pp 158-159)

Ms. Lee was interviewed by the police. She was feeling confused and lost. She knew she was a suspect due to the questions they asked her. At the time of her testimony she was much clearer. (Id. p 161) Defendant was the only one who had the care and custody of Antonio. She did not harm Antonio. He was fine when she last saw him on March 24th. (Id. p 164)

On cross examination Ms. Lee was impeached with some statements she had made to the police on March 25th about her observations of Antonio when she got home from work. (Id. pp 170, 181) She was also impeached with inconsistencies in her testimony about calling Defendant from work on March 24th. (Id p 180)

Dr. John Bechinski testified that he was a forensic pathologist at Sparrow Hospital and was qualified as an expert in that field. He performed an autopsy on Antonio Burks.

Dr. Bechinski first described his external examination. Antonio Burks was six months old, 27 inches long and weighed 14 pounds. (Id. pp 208, 223) Dr. Bechinski did not observe any bodily fluids on his body. (Id. p 211) He also observed the following injuries, which he documented with photographs: a linear scrape on his right forehead; a purple bruise on the right temporal scalp; a purple bruise on the right cheek; a contusion on the left upper lip; the frenulum, which attaches the gums to the upper lip, was torn and next to it was a bluish purple bruise; at least 20 round oval irregularly shaped bruises on his chest and abdomen (arranged in almost a vertical fashion); two oval purple bruises on the lower back; and a bruise on the front upper left thigh.(Id. p 217)

Dr. Bechinski testified that a torn frenulum is seen in suffocation deaths, when someone attempts to suffocate another person and the amount of force used can cause such tearing. It's possible that it was caused by someone trying to keep a crying child quiet. (Id. p 220) He characterized it as an uncommon child abuse injury, but one which he sees more in children than in adults. (Id. p 221) The bruising pattern he saw on Antonio is one which he sees when individuals pick up an infant with their hands and apply pressure with their fingertips, causing contusions. They could also be inflicted with knuckles. (Id. pp 221-222) He testified that the photos of Antonio's injuries were "textbook battered child photos". (Id. p 223)

Dr. Bechinski also testified about his internal examination of Antonio Burks. He began with the head, where he found two areas of bleeding: under the right temporal

scalp and also under the scalp on the frontal region. (Id. pp 224-226). Next, Dr. Bechinski discovered a full thickness tear of the superior vena cava, which he explained is the main vein that returns blood from the head to the upper extremities and back to the heart. He found bleeding next to the tear and in the cavity surrounding the heart. These are the types of injuries commonly seen in high-speed motor vehicle collisions. It requires a lot of force to produce these injuries. This injury alone was enough to cause death. (Id. pp 227-228) He found injuries on other organs as well. There were:

“[b]ruises on the surface of the lungs. Also evidence of bleeding within the lungs. There was evidence of bleeding near the site of the right lung where the main blood vessels enter and exit the lungs, as well as the bronchus enters the lung to take air into it. There were two lacerations on the right lobe of the liver. A laceration inside the left lobe of the liver. And an additional laceration on the left lobe of the liver. So a total of four tears of the liver were present. There were two lacerations on the spleen. There was associated evidence of bleeding into the abdominal cavity. The left testicles (sic) was surrounded by thick hemorrhage. There were additional bruises present on the diaphragm, on the thymus, on the ascending and transverse colon as well as the duodenum, which is the first part of the small intestine. The right adrenal gland was pulpified, meaning it was fragmented. And there was evidence of bleeding around the right adrenal gland.” (Id. pp 228-229)

Dr. Bechinski explained that the liver is on the upper right part of the abdomen and the spleen is on the upper left. There would have been impacts to both sides of the body to cause those injuries. He testified that these injuries were the result of blunt force trauma, like a high speed collision. (Id. pp 231-234) These were life – threatening injuries which would necessitate immediate medical treatment. (Id.) A baby with these injuries would become fussy and then become unresponsive due to blood loss. It was possible that blood coming from the trachea and lungs could come out of the baby’s mouth and nose. (Id. p 233)

Dr. Bechinski also had toxicology screens done to rule out other possible causes of death. These screens were negative. Dr. Bechinski concluded that the cause of death was multiple blunt force trauma and the manner of death was homicide. He also testified that injuries inflicted by inappropriate CPR would not affect the head, testicles or legs. Such injuries might involve some bruises, scrapes and rib fractures, although he noted that the ribs of children are more elastic than adults. It was his conclusion that the injuries he saw on Antonio Burks were not from inappropriate CPR. (Id. pp 237-238) The injuries could not have resulted from inappropriate CPR after the child died. Bruises and lacerations with associated hemorrhage indicate that there is blood pressure at the time the injury is sustained and could not have happened after death. (Id. pp 245-246) He said that the injuries he saw could have been caused by squeezing, punching, shaking or striking a wall. (Id. p 240)

The final prosecution witness was Detective Sheriff Fadly, formerly with the East Lansing Police Department. (Tr. 9/21/12) Detective Fadly interviewed Defendant three times. The first time was on March 25, 2011. The interview was video taped and took place in an interview room at the East Lansing Police Department. Defendant was not under arrest and could leave at any time. (Id. pp 23, 27-29) The first interview was admitted as People's Exhibit 26 and played for the jury. During the first interview Defendant only admitted that he had made a mark on his son's cheek by giving him hickies, that he had slapped Antonio and that he pinched Antonio's inner thighs and told him to "hush". (Tr. 9/24/12, pp 13-16) These injuries were consistent with Antonio's external injuries but not consistent with all of his injuries. (Id. p 78)

Detective Fadly learned about the findings of the pathologist on March 26, 2011. Due to information about a disturbance between Defendant and Sheretta Lee and based on the information from the pathologist, the East Lansing Police arrested Defendant on March 26th, which was a Saturday. Defendant requested to speak to Detective Fadly, who came in on his day off to interview Defendant. The interview took place in the same interview room. This time Defendant was advised of his Miranda rights.⁶ (Id. pp 18-20) Defendant told Detective Fadly that he talked to his family and they told him to change his statement because he was “throwing his life away.” (Id p 24) Defendant said he wanted to change his earlier statement that he bit and suck to just sucking on Antonio. He said he didn’t slap Antonio but that he was always gentle. He gave Antonio a bath but didn’t leave him alone for five minutes but only for a few seconds. (Id. pp 28-29) Detective Fadly told Defendant he didn’t believe him. Defendant talked to Detective Fadly for six hours and told him Antonio had fallen out of bed on five separate occasions, beginning in the third week of February and ending on March 23, 2011. (Id. pp 30-33) Defendant said his son did not die in the bath. (Id. p 34) Detective Fadly concluded the interview because Defendant had told the five stories and was not saying anything new. (Id. p 35) Detective Fadly did not think the falls described by Defendant caused the injuries outlined in the pathologist’s report. He just let Defendant talk. He did not think Defendant was telling the truth. (Id. pp87-89)

Detective Fadly reviewed the full pathologist report and discussed all of the injuries with his colleague and concluded that the internal injuries were not consistent with what Defendant was telling him. (Id. pp 35-36) He decided to question Defendant

⁶ *Miranda v Arizona*, 384 US 436 (1966)

one more time and told him they were going to pick up his wife Sheretta Lee for questioning. She was a suspect at that time (Id. pp 37-38, 40) Once again, Detective Fadly read Defendant his Miranda warnings and Defendant waived his rights and agreed to speak to him.(Id. pp 38-39)

Detective Fadly testified about the inconsistent information that Defendant told him about visiting his neighbor Travis Parris. During the first interview on March 25, Defendant said he had gone to Travis' home three times on March 24th and that Antonio was with one of those times. The next story Defendant told about his visits with Travis, were that he went to Travis' home three times, did not take Antonio with him and during his second visit at the Parris home he smoked marijuana. (Id. pp 43-44)

During the March 28th interview, Defendant said he was home after his second visit to Parris' home. He had smoked marijuana at Parris' home. At about 10:00 p.m. he was laying on the bed with Antonio while the baby drank a bottle. Antonio was laying on defendant's left side. He covered Antonio's head with a blanket while Defendant watched the Cartoon Network. Defendant claimed he fell asleep and rolled over onto Antonio. Defendant demonstrated this, but indicated that he rolled to his right, which was not the side Antonio was laying on. (Id, pp 43-45)

Defendant said he was laying on Antonio for 15 minutes. (Id. pp 45-46) When he woke up Antonio was gasping for air and his eyes were rolling back in his head and he panicked. He started to go crazy. He said he shook Antonio to wake him. (Id. pp 46-47) He then attempted to revive him by punching his right side and then his left side repeatedly, approximately 15 times. He was pushing with the heel of his palm. (Id. pp 47-48) Antonio did not react to these attempts to revive him. (Id. p 49)

Defendant then put Antonio in the bathtub. He kept telling Antonio to breathe, but he got no reaction. Defendant hit him in the face and shook his face. While he was shaking him, Antonio slipped out of his hands and fell onto his ribs on the side of the bathtub and then flopped onto the floor. (Id. pp 49-50) Defendant never called 9-1-1 for help. He wanted to be a good father and be the one to 'bring him back'. (Id. pp 50-51) Defendant said at this point the baby was laying on the floor and his leg was shaking. (Id. p 52) He grabbed the baby and ran into the bedroom. Defendant told Detective Fadly that there was blood and stool coming out of the baby's mouth. (Id) Antonio kept shaking. Defendant kept telling him to breathe. He wiped him down, put powder and Vaseline on him and put a diaper and a onesie on him. (Id. p 53)

Defendant still did not call 9-1-1. He was worried about what his family would think. He loved Antonio. He put him to bed. He didn't tell his wife. He was hoping that Antonio would be okay and in the morning they would just take him to Ready-Care. (Id. pp 53-55) When Defendant was talking to Detective Fadly he kept vacillating between saying that he thought Antonio was fine to saying he thought Antonio was starting to die or that he thought he was dead. (Id. p 55)

Defendant told Detective Fadly that he had been dishonest because he wondered what his family and community would say. He also thought he would go to jail for the rest of his life. He claimed it was an accident. (Id. p 62) Defendant also told Detective Fadly 'You got your man. You got your baby killer. Let's get this done.' (Id. pp 117-118) The People rested their case (Id. p 119) and the trial court denied Defendant's Motion for Directed Verdict. (Id. pp 123-125)

Defendant Yumar Antonio Burks then took the witness stand. He testified that he had completed three years at Alabama State University and moved to Michigan to be with his wife. (Id. p 132) Defendant said his son Antonio Burks passed away on March 25, 2011 because Defendant was not paying attention to him and made the wrong decisions. (Id. p 134) Defendant admitted he was not truthful during the three interviews he gave, but said the last one was “most truthful”. (Id. p 136)

During the first interview Defendant felt that it was possible his son had drowned. (Id. p 140) He knew at the time that he had been aggressive with his son. (Id. p 141) He believed that sucking on Antonio’s cheek was his “affection” towards his son. He did it the same way every time. (Id. p 143) He pinched Antonio as a sign of affection, but now he does not think pinching is okay. (Id. p 144)

The second interview Defendant gave about the “five falls” was largely untrue. (Id. p 147). Then Defendant told the jury yet another story about what occurred on March 24, 2011. After Sheretta left for work he was playing a video game. Antonio was with him and he went to sleep. Defendant left the house at about three and went to Travis’ house. He went back home to check on Antonio after about 30 minutes when Travis suggested he do so. Antonio was still asleep, so he went back to Travis’ house and stayed for 45 minutes to one hour. (Id. pp150-152) Antonio was waking up so he stayed home with him.

Defendant fed and changed Antonio and played with the Xbox Live. He stayed home the rest of the day until his wife got home around 12 that night. (Id. pp 154-155) Around 10 he decided to take a nap. Defendant and Antonio were laying down on the bed. (Id. p 156) He fell asleep and rolled over on Antonio. He was not on Antonio for 15

minutes as he told Detective Fadly on March 28th, but was on him for a minute or so. It was brief. (Id. pp 157-158) Antonio was not right, he was gasping, and he was in distress, having a hard time breathing. (Id. p 159) He performed CPR on him and brought him out of the choking state. He appeared fine. (Id)

Defendant wanted to make sure he was okay so he gave him a bath. He stepped out of the bathroom to get some supplies and he heard a noise that didn't sound right. (Id. p 161) It was a coughing kind of choking sound. (Id. p 162) He was out of the room a minute or two, it was brief. (Id. p 163) Antonio slid down in his baby seat and his whole body was under the water. (Id. p 164) Defendant grabbed Antonio out of the tub. He was in a lot of distress, choking. (Id. p 166) Defendant dropped down to his knees and turned him over and began tapping on his back. (Id. p 167) Defendant turned him over and didn't think it was working. He immediately began doing adult CPR. This was successful. The water came out and he started to breathe. He wasn't choking anymore. (Id. pp 167-168) This was when he struck Antonio. (Id. p 169) He thinks it was less than 15 times and he did not punch Antonio. (Id. pp 169-170)

Defendant could not say if he hit Antonio too hard. (Id. p 171) He believed he was successful at getting him to breathe. (Id. p 171) He did not seem to be in distress and went to sleep. (Id. p 172) When Sheretta came home she looked at him. He was breathing. She did not voice any concern and he was relieved. He went back to Travis' house and he thought Antonio was fine. (Id. pp 173-174)

Defendant acknowledged that when he went back to Travis' house he didn't play games but just sat on the couch because he was "shocked" about what had happened. (Id. p 175) He was not upset. (Id.) Defendant acknowledged he lied during the second

interview, because he was worried about getting in trouble. He denied that he intentionally hurt his son. (Id. p 177)

On cross examination Defendant testified that he had a daughter who was born in 2005 and lives in Alabama. (Id. p 180) He never changed or fed his daughter. He was never alone with his daughter. (Id. p 181-182) He married Sheretta because she was pregnant. (Id. p 183)

Defendant denied that he smoked marijuana at Travis' house the second time he went over there on March 24th, contrary to what he told Detective Fadly on March 28th. He claimed he used marijuana the last time he went over there. (Id. p 185) He denied that Antonio's eyes rolled back into his head after he had rolled over on top of Antonio, again contrary to what he had told Detective Fadly. (Id. p 187)

Defendant said he did not grab Antonio by the face and shake him. He claimed he didn't lie to Detective Fadly, he "wasn't just very truthful." (Id. p 194) He denied dropping his son or hitting him on the side of the tub. (Id. pp 194-195) After the bath, Antonio could not cry but was making a high-pitched whaling sound. (Id. p 195) Defendant agreed that he punched Antonio's sides but that 15 times was an exaggeration. (Id. p 197) He knew better than to punch a child in a vital area, like his stomach. (Id. p 198) He agreed that he told Detective Fadly that before he laid Antonio down he knew he was slipping. He had a hard time sleeping that night. He didn't check the baby when he went to bed at 3 in the morning. (Id. p 199) He actually picked up the phone to call 9-1-1 at one point but did not do it because of what people were going to think. (Id. p 200) He denied squeezing him or hitting Antonio with his knuckles. (Id. p 204) Sheretta had nothing to do with this. He never told her the truth. (Id. p 205)

Defendant denied that there were any bruises on Antonio after performing CPR on him. (Id. p 212)

At the close of proofs, Defendant's trial counsel requested a jury instruction on child abuse – second degree under the theory that Defendant committed a reckless act and as a result of the reckless act, Antonio Burks suffered serious physical harm. (09/24/12, 219-220) Defendant's trial counsel argued to allow the jury to determine that the Defendant committed a reckless act providing the court with three potential reckless acts including Defendant rolling over onto Antonio, Defendant leaving Antonio alone, and Defendant allowing Antonio to slip under the water in the bathtub. (09/24/12, 220) Defendant's trial attorney then argued that the jury could conclude that the serious harm followed these reckless acts. (09/24/12, 220) The trial court opined that the acts testified to by the Defendant, mainly that he repeatedly "punched" Antonio and "intentionally did it", did not amount to reckless acts, rather the testimony of the Defendant was that these were intentional acts. (09/24/12, 221-222) The prosecutor then noted that the testimony from medical personal did not support that the reckless acts Defendant testified to such as rolling over onto Antonio, allowing him to slip under the bathwater, or leaving Antonio home alone had caused the death of Antonio. (09/24/12, 223) Rather the death was caused by blunt force trauma. (09/24/12, 223)

Finally, the trial court ruled that the serious injury resulted from the intentional acts of Defendant punching the child as Defendant had testified to during his trial testimony. (09/24/12, 224) The Court ruled that the act of striking a child is an intentional act, not a reckless act. (09/24/12, 225) Therefore the court declined to instruct the jury as to second-degree child abuse. (09/24/12, 225) The trial court

instructed the jury as to felony murder⁷, second-degree murder⁸, involuntary manslaughter⁹, the definition of gross negligence¹⁰ and child abuse first degree¹¹.(Id p 225)

On September 25, 2012 the jury found Defendant guilty of first degree child abuse and felony murder. (Tr. 9/25/12, p 78) Defendant now appeals.

⁷ CJI2d 16.4

⁸ CJI2d 16.5

⁹ CJI2d 16.10

¹⁰ CJI2d 16.18

¹¹ CJI2d 17.18 (The trial court mistakenly called this number 16.18.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S REQUEST FOR A JURY INSTRUCTION UNDER MCL 750.136B(3)(A) (RECKLESS ACT) WHEN THE EVIDENCE WOULD NOT HAVE SUPPORTED A CONVICTION UNDER THIS THEORY.

Defendant's Argument

Defendant is entitled to a new trial where the trial court declined to instruct the jury as to second degree child abuse as requested by the defense where there was evidence to support such an instruction.

Issue Preservation

The issue was preserved by Defendant who requested an instruction on child abuse, second degree under the theory of MCL 750.136b(3)(a) (reckless act) in the trial court. Defendant's trial counsel argued that it was a reckless act, not an intentional act that lead to the serious physical harm of Antonio Burk.

Standard of Review

"[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113 (2006), quoting *People v Hawthorne*, 265 Mich App 47, 50 (2005). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460 (2008)

People's Argument

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Hawthorne*, 474 Mich 174, 182 (2006), quoting *People v Rodriguez*, 463 Mich 466, 472 (2000). The trial court may provide an instruction when

the evidence presented at trial supports giving that instruction. *People v Johnson*, 171 Mich App 801, 804 (1988). Jury instructions must fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606 (2005).

At trial, Defendant's trial counsel requested a jury instruction on child abuse – second degree under the theory that Defendant committed a reckless act and as a result of the reckless act, Antonio Burks suffered serious physical harm. (09/24/12, 219-220) Defendant's trial counsel argued to allow the jury to determine that the Defendant committed a reckless act and provided the court with three potential reckless acts including Defendant rolling over onto Antonio, Defendant leaving Antonio alone, and Defendant allowing Antonio to slip under the water in the bathtub. (09/24/12, 220) Defendant's trial attorney then argued that the jury could conclude that the serious harm followed these reckless acts. (09/24/12, 220) The trial court opined that the acts testified to by the Defendant, mainly that he repeatedly "punched" Antonio and "intentionally did it", did not amount to reckless acts, rather the testimony of the Defendant was that these were intentional acts. (09/24/12, 221-222) The prosecutor noted that the testimony from medical personal did not support that the reckless acts Defendant testified to such as rolling over onto Antonio, allowing him to slip under the bathwater, or leaving Antonio home alone had caused any serious physical harm of Antonio. (09/24/12, 223) Rather the medical evidence demonstrated that his death was caused by blunt force trauma. (09/24/12, 223)

Finally, the trial court ruled that the serious injury resulted from the intentional acts of Defendant punching Antonio as Defendant had testified to during his trial testimony. (09/24/12, 224) The Court ruled that the act of striking a child is an intentional act, not a reckless act. (09/24/12, 225) Therefore the court declined to instruct the jury as to second-degree child abuse¹². (09/24/12, 225)

In this case, taking Defendant's testimony as truthful, Defendant testified to two different types of acts he committed on the date Antonio was killed – both intentional acts and reckless acts. The trial court did not err when it found that no evidence existed that the reckless acts testified to by Defendant had caused serious physical harm to Antonio. In addition, a reckless act is not a lesser included offense of an intentional act and therefore the trial court was not required to give the instruction for child abuse second degree under a theory of a reckless act to the jury as a necessarily lesser included offense¹³.

¹²The following day, the trial court revisited its previous ruling and clarified that

"The Court would not give child abuse second as requested by the defense. I just want the record to reflect that I was cognizant of the lead case, I think, Magnuson (ph). In that matter the parents had left the child in the car on a hot summer day. Went off and left the parent – left the child in the car for three or four hours. And the child asphyxiated and died.

In that case, the appellate court indicated that the Defendant was entitled to a second-degree child abuse because the act of leaving a child in the car did not necessarily leave, it was anticipated or intended that death would occur. And the court felt that this case differed in that, in that all the reckless acts that may have occurred, I enumerated yesterday, none of those caused the death. Here the death was caused by Mr. Burks striking the child some unspecified number of times, depending on how you look at it.

And the Court, in the autopsy report read that those blows caused the death of the child. The Court ruled that was an intentional act that wasn't reckless. And an intentional act of striking the child, even if it was . . . under Mr. Burks' mistaken belief that the child had drowned, although the pathologist clearly indicates there was no water there. And under the mistaken belief that Mr. Burks was trying to implement some type of life-saving device or technique that he had seen on TV, the Court felt that the act of striking the child like that repeatedly were intentional and those acts by themselves would likely to cause serious harm.

[09/25/12, 13-14]

¹³ This argument will be addressed below in Argument II

The jury instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606 (2005). In this case, while the Defendant testified to certain potential reckless acts such as allowing Antonio to slip under the water in the bathtub, leaving Antonio unattended to while he went to the neighbor's house and rolling over on top of Antonio while they were both sleeping, the medical testimony did not support that these acts caused the death or any serious physical harm to Antonio.

Dr. John Beckinski, an expert in forensic medicine, performed an autopsy on Antonio Burks and found the following injuries:

- Scrap on forehead (09/24/12, 217)
- Bruise on the right cheek (09/24/12, 216)
- Bruise on the right temple with an underlying hemorrhage on the scalp (09/24/12, 216, 226)
- Contusion on the left upper lip (09/24/12, 217)
- Break in the upper left abdomen (09/24/12, 217)
- Laceration/Tear of the upper frenulum¹⁴. (09/24/12, 217, 219)
- Bruise near the torn frenulum (09/24/12, 217, 219)
- Bruising on the upper mouth and lip (09/24/12, 219)
- 20 round oval irregular shaped bruises on the check and abdomen¹⁵ (09/24/12, 217)
- Two oval bruises on the lower back (09/24/12, 217)
- Bruise on the front of the upper thigh (09/24/12, 217)
- No fractures of broken bones (09/24/12, 224)
- Bleeding under the scalp in the area of the forehead and temple (09/24/12, 224)
- Full thickness tear in the main vein that returns blood to the heart, this injury is commonly scene in a "high –speed motor vehicle collision." This injury alone could be fatal (09/24/12, 227-228)

¹⁴ Frenulum is the part of the skin that attaches the gums to the lip. (09/24/12, 217)

¹⁵ Dr. Beckinski described these bruises to be in a linear fashion consistent with someone picking up a child and applying enough pressure to cause bruising with their fingertips or knuckles. (09/24/12, 221-222)

- Bruises on the surface of the lungs (09/24/12, 228)
- Four lacerations to the liver: Two lacerations on the right lobe of the liver, one laceration to the left lobe of the liver, one laceration inside the left lobe of the liver caused by blunt force injury (09/24/12, 228, 230)
- Two lacerations of the spleen (09/24/12, 228)
- Bleeding into the abdominal cavity. (09/24/12, 228)
- Left testicles were surrounded by thick hemorrhage/blood caused by blunt force trauma. (09/24/12, 228, 235)
- Bruises on the diaphragm, thymus, colon, small intestines. (09/24/12, 228)
- Right Adrenal gland was pulpified (fragmented) (09/24/12, 228)

Antonio's injuries evidenced blunt force to his head, torso, abdomen, testicle, thigh and back. (09/24/12, 242) Based upon his evaluation, Dr. Beckinski opined that Antonio died from "multiple blunt force trauma¹⁶." (09/24/12, 236)

Dr. Beckinski explained that the injuries associated with improper CPR would typically be bruising in the chest or fractured ribs. (09/24/12, 238) He further testified that the injuries suffered by Antonio were not consistent with improperly administered CPR. (09/24/12, 238) Dr. Beckinski noted that the bruising suffered by Antonio occurred when Antonio was alive and some of the areas, specifically the bruising to the testicles, were inconsistent with inappropriate CPR. (09/24/12, 238) Further, Dr. Beckinski testified that there was no water in the lungs that would be consistent with drowning or an accident occurring in the bathtub. (09/24/12, 243-244)

The trial court must give jury instructions supported by the evidence presented at trial. *People v McGhee*, 268 Mich App 600, 606 (2005) Assuming *arguendo*, that the jury believed that the reckless acts testified to by defendant happened in the manner in

¹⁶ Dr. Martin Romero, an emergency medicine physician that treated Antonio, observed purple around Antonio's umbilicus (belly button) which is indicative of bleeding from internal sores and often seen in traumas such as motorcycle accidents. (09/20/12, 14-15) Based upon his observations, Antonio's low body temperature and the opaqueness of his eyes, Dr. Romero, believed that Antonio had passed away two to twelve hours before coming to the emergency room. (09/20/12, 54-55)

which he testified, no evidence was presented that serious harm was caused directly by these actions¹⁷. Serious harm is defined as “any physical injury to a child that seriously impairs the child’s health or physical well-being, including but not limited to brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or sever cut.” MCL 750.136b. While the evidence supported that Antonio suffered severe physical harm that ultimately lead to his death, the medical testimony definitively concluded that this harm was caused by intentional acts of blunt force trauma.¹⁸

Therefore, the trial court did not abuse its discretion by failing to give a jury instruction when the evidence would not have supported a finding that any of the alleged reckless acts caused serious physical harm to Antonio as required under MCL 750.136b(3)(a).

¹⁷ Defendant’s trial counsel conceded that the alleged reckless act of leaving Antonio alone did not cause him any serious harm. (09/25/14, 39)

¹⁸ Insomuch that this court believed Defendant’s application of adult CPR could have been viewed as a reckless act rather than an intentional act, the medical testimony concluded that the bulk of the injuries could not have resulted from inappropriate CPR especially if the CPR was administered after Antonio had passed away.

II. CHILD ABUSE SECOND DEGREE UNDER MCL 750.136B(3)(A) (RECKLESS ACT) IS NOT A NECESSARILY INCLUDED LESSER OFFENSE OF CHILD ABUSE 1ST DEGREE BECAUSE THE RECKLESS INTENT REQUIRED FOR CHILD ABUSE SECOND DEGREE IS CATEGORICALLY DIFFERENT FROM THE INTENTIONAL INTENT REQUIRED FOR A CONVICTION OF CHILD ABUSE FIRST DEGREE.

Defendant's Argument

Defendant argued for the trial court to instruct the jury as to child abuse second degree under a theory that Defendant committed a reckless act that ultimately caused serious physical harm to Antonio. In doing so, Defendant argued that the jury could have found that the Defendant committed reckless acts and as a result Antonio suffered serious physical harm. On appeal, Defendant argued that the trial court erred by failing to instruct the jury as to child abuse second degree under a theory of an intentional act likely to cause serious physical harm. Defendant argument on appeal at the Court of Appeals did not address whether Child Abuse second degree under a theory of a reckless act is a necessarily lesser included offense of Child Abuse First Degree.

Issue Preservation

The Defendant requested a jury instruction as to child abuse second degree under a theory of a reckless act causing serious physical harm during his trial. This issue is preserved. Defendant did not request a jury instruction as to child abuse second degree under a theory that Defendant committed an intentional act that was likely to cause serious harm to Antonio. Rather, Defendant's trial counsel argued that Defendant lacked the required intent for a conviction to child abuse first degree and therefore the jury should find him not guilty.

Standard of Review

Whether Child Abuse Second Degree under a theory that Defendant committed a reckless act causing serious physical harm is a necessarily lesser included offense of child abuse first degree is an issue of law. Issues of law arising from jury instruction are reviewed de novo. *People v Gillis*, 474 Mich 105, 113 (2006).

Argument

When a Defendant is charged with a crime that consists of different degrees, a jury may find the Defendant guilty, not guilty or guilty of “a degree of that offense inferior” to the original charged offense. MCL 768.32(1) An offense is considered “inferior” when the lesser offense is necessarily included in the greater offense. *People v Cornell*, 466 Mich 335, 355 (2002); *People v Wilder*, 485 Mich 35, 41 (2010) A lesser offense is “necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense.” *Wilder, supra* at 41. Necessarily included offenses differ from cognate offenses in that cognate offenses share several elements and are the same class or category as the greater offense, but contain elements not found in the greater offense. *Id.* In other words, a necessarily included lesser offense is a crime for which it is impossible to commit the greater offense without first having committed the lesser. *Cornell, supra* at 356.

A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical harm or serious mental harm to a child. MCL 750.136b(2) In *People v Maynor*, 470 Mich 289, 291 (2004), this Court held that to be convicted of this offense the prosecution must prove not only that the defendant

intended to commit the act, but also that the Defendant intended to cause serious physical harm or knew that serious physical harm would be caused by his action. As applied to this case the elements of child abuse first degree are (1) Defendant is the parent, guardian, or had care or custody over Antonio when the abuse allegedly happened; (2) Defendant either knowingly or intentionally caused serious physical harm to Antonio; and (3) Antonio was under that age of 18 at the time of the abuse. MCL 750.136b(2); M Crim JI 17.18.

A person can be found guilty of child abuse in the second degree under four separate theories; first, if the person's omission causes serious physical harm or serious mental harm to a child; second, if the person's reckless act causes serious physical harm or serious mental harm to a child; third, if the person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results and fourth, if the person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. MCL 750.136b(3)(a), MCL 750.136b(3)(b), and MCL 750.136b(3)(c).

Defendant's trial counsel's theory of the case from the beginning was three-fold. First, Defendant argued that he never intended to cause serious physical harm to Antonio by intentionally striking him and therefore he lacked the intent requirement of child abuse – first degree. (09/17/12, 162) Second, defendant argued that the jury would have to decide if Defendant acted recklessly and as a result of those reckless acts cause harm to Antonio. (09/17/12, 162) Lastly, defendant argued that he simply made a mistake and should be found not guilty. (09/17/12, 162)

After the close of proofs, Defendant's trial counsel requested a jury instruction as to child abuse second degree on the basis of reckless acts only under MCL 750.168b(3)(a). (09/24/12, 220-222) Defendant never requested a jury instruction alleging that Defendant knowingly or intentionally committed an act, likely to cause serious physical or mental harm, regardless of whether actual harm results under MCL 750.168b(3)(b)¹⁹. A trial court is not required to sua sponte give a jury instruction unless it is requested by the defense attorney. *People v Henry*, 395 Mich 367, 374 (1975); *People v Reese*, 242 Mich App 626, 629 (2000)

Therefore, in this case, the defendant only argued the second theory of child abuse second degree stating that he committed a reckless act and the result of the reckless act was serious physical harm. (09/24/12, 219-220) Therefore the requisite elements for a conviction to child abuse second degree in this case would be: (1) Defendant is the parent, guardian, or had care or custody over Antonio when the abuse allegedly happened; (2) Defendant committed a reckless act; (3) as a result of Defendant's reckless act, Antonio suffered serious physical harm; and (4) Antonio was under that age of 18 at the time of the abuse. MCL 750.136b(3)(a)-(c); M Crim JI 17.20

Under this theory of child abuse second degree, it is not a necessarily lesser included of the crime of child abuse first degree because a reckless act resulting in

¹⁹ The Court of Appeals analyzed whether child abuse second degree was a lesser included offense of child abuse first degree when the theory under which child abuse second degree is alleged is that the person "knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results" *People v Burks*, ___ Mich App ___ (2014)(slip op 7). This was consistent with Defendant's argument on appeal however inconsistent with Defendant's request at trial. The Court of Appeals opined that defendant's statement that he left Antonio in the bathtub unattended for a brief period of time could have resulted in a conviction of child abuse second degree under MCL 750.136b(3)(b) without regard to any harm resulting from his actions. This argument was never raised during the trial court proceedings.

physical harm is not subsumed by an intentional act committed with the specific intent to cause serious physical harm. The level of intent addressed in child abuse second degree is not subsumed by child abuse first degree

Under the child abuse first degree statute, a person must both intend to commit an act and intend to cause physical harm or know that serious harm would be caused to the child by committing the act. *People v Maynor*, 470 Mich 289, 291 (2004). By contrast, child abuse second degree requires a “reckless act.” A “reckless act” can be defined as acting in disregard of, or with indifference to, the consequences of one’s actions²⁰. A conviction to child abuse second degree under a theory of “recklessness” requires proof of a categorically different criminal intent than a conviction to child abuse first degree. Because “reckless” intent is insufficient *mens rea* for the purpose of proving child abuse first degree, the question remains whether this different *mens rea* is completely subsumed by the greater, intentional, *mens rea* required for child abuse first degree. See *People v Brown*, 267 Mich App 141, 150 (2005)²¹

An act done with indifference to the consequences of the action cannot be subsumed by an act done specifically with the intent to cause an end result. These two

²⁰ In *People v Gregg*, 206 Mich App 208, 212 (1994), the Court of Appeals utilized the dictionary definitions contained in both Black’s Law Dictionary and the Random House College Dictionary to define the term “reckless” as noted in child abuse fourth degree. The Court cited that “Black’s Law Dictionary (6th ed) defines “reckless” as: Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be “reckless” it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended. *The Random House College Dictionary, Revised Edition*, defines “reckless” as: 1. utterly unconcerned about the consequences of some action; without caution; careless ... 2. characterized by or proceeding from such carelessness.

²¹ In *Brown*, the court determined that the lesser *mens rea* of intent to do great bodily harm was subsumed into the greater *mens rea* of intent to murder. The Court held that assault with intent to do great bodily harm is a necessary lesser included offense to assault with intent to murder.

states of minds are categorically different. One typically does not first act reckless, thus committing the crime of second degree child abuse, then change one's intent to a thought out and intentional desire for the end results. The crime of child abuse second degree involving a reckless act includes an element of a completely different intent than child abuse first degree and therefore is not a necessarily included lesser offense.

Stated differently, under this theory of child abuse second degree, one can commit the crime of child abuse first degree without having first committed the crime of child abuse second degree. *Cornell, supra* at 356. Child abuse second degree under a theory of a reckless act causing serious physical or mental harm is a cognate lesser offense to child abuse first degree not a necessarily lesser included offense and therefore under *Cornell, supra* the court would not be required to instruct on it.

If this Court determines that child abuse second degree, when based upon a reckless act, is a necessarily lesser included offense of child abuse first degree, the trial court's failure to instruct the jury was harmless error.

Instructional errors concerning necessarily included lesser offenses are subject to a harmless error analysis. *People v Cornell*, 466 Mich 335, 361 (2002) "A preserved, non-constitutional error is not a ground for reversal, "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable that not that the error was outcome determinative." *Id.* at 363. (internal citations omitted)

The standard for whether an instruction is submitted to a jury is different than the standard to determine if an error in instruction requires reversal. "More than an evidentiary dispute regarding the elements that differentiates the lesser from the greater

offense is required to *reverse* a conviction, pursuant to MCL 769.26, the “entire cause” must be surveyed.” *Cornell, supra* at 365-366.

Antonio Burks was an infant incapable of walking or crawling. (09/24/12, 184) He couldn’t change his own clothes, eat solid foods on his own, and relied on his mother and the Defendant for his daily needs. (09/24/12, 184) On March 24, 2012, when he entered the emergency room, Antonio was covered from head to toe in bruises. Internally, Antonio suffered from multiple lacerations on his liver, lacerations on his spleen, a torn frenulum, bruises on his lungs, diaphragm, thymus, colon and small intestines, and a full thickness tear in the main vein returning blood to his heart – an injury consistent with a high-speed motor vehicle collision. (09/24/12, 217-219, 227-228) Antonio’s left testicle was surrounded by thick hemorrhaging caused by blunt force trauma and his right adrenal gland was pulpified. (09/24/12, 228, 235)

Antonio’s injuries evidenced blunt force to his head, torso, abdomen, testicle, thigh and back. (09/24/12, 242)

Dr. Beckinski explained that the injuries associated with improper CPR would typically be bruising in the chest or fractured ribs. (09/24/12, 238) Antonio had no fractured or broken bones. (09/24/12, 224) He further testified that the injuries suffered by Antonio were inconsistent with improperly administered CPR. (09/24/12, 238) Dr. Beckinski noted that the bruising suffered by Antonio occurred when Antonio was alive and some of the areas, specifically the bruising to the testicles, were inconsistent with inappropriate CPR. (09/24/12, 238) Further, Dr. Beckinski testified that there was no water in the lungs that would be consistent with drowning or an accident occurring in the bathtub. (09/24/12, 243-244)

Antonio's sever injuries must also be viewed in the context of Defendant's demonstrated feelings of personal frustration and rage on the day Antonio was killed. The very morning that Defendant inflicted these numerous, severe injuries on Antonio, he had punched holes in the walls of the family home and made threatening comments to Sheretta Lee that "this could be you". (09/20/12, 127-130) Defendant admitted in his testimony that he knew better than to punch a child in a vital area, like their stomach. (9/24/12, p 198) Yet this is exactly the area where Antonio sustained multiple blunt force trauma of sufficient force to lacerate his liver and spleen, 'pulpify' his adrenal gland and bruise many other internal organs. (9/20/12, 228-229)

Defendant suggested in his testimony that one of the reckless acts was his inept attempts at performing CPR. This was directly contradicted by the testimony of Dr. Bechinski, that the injuries to the child's head, legs and testicles could not have been the result of inappropriately administered CPR. It was Dr. Bechinski's opinion that none of the injuries he saw were the result of inappropriate CPR. (09/20/12, 237-238) Dr. Romero also expressed his opinion that it was very unlikely that the injuries he saw were caused by the improper administration of CPR. (09/20/12, 47) It was Dr. Bechinski's conclusion that the injuries he saw were caused by squeezing, punching, shaking or striking a wall. (09/20/12, 240)

The jury was also faced with Defendant's ever-changing version of what occurred. While Defendant testified that he never intended to cause Antonio any harm, Defendant's credibility was extremely limited in light of his admitted fabrications, the changing nature of his story, and the scientific evidence which directly contradicted his testimony.

A preserved claim of a requested jury instruction on a necessarily lesser included is not ground for reversal “unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496 (1999). Defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included instruction undermined reliability in the verdict. *People v Carines*, 460 Mich 750, 774 (1999); *People v Cornell*, 466 Mich 335, 364 (2002).

The jury was instructed as to the crimes of first degree child abuse (09/25/12, 67), felony murder (09/25/12, 68), second-degree murder (09/25/12, 69) and involuntary manslaughter (09/25/12, 70). The jury, after careful deliberations, rejected the opportunity to find Defendant guilty of second-degree murder or involuntary manslaughter, and found defendant guilty of first degree child abuse and felony murder. (09/25/12, 78) The jurors were given the option to find that Defendant did not intend to cause the harm of Antonio and rather that his actions were negligent and therefore find him guilty of the lesser offense to murder of involuntary manslaughter. The jury rejected this option.

Defendant has failed to meet his burden of proof to show that the failure to give a jury instruction as to child abuse second degree was outcome determinative. The jury was provided the opportunity to find Defendant guilty of offenses that would have been consistent with a lesser intent than child abuse first degree (e.g. manslaughter) and chooses not to do so.

RELIEF REQUESTED

WHEREFORE, the People respectfully request that this Court deny Defendant's Application for Leave to Appeal.

Dated: 07/24/2015

/s/ Nicole Matusko
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CERTIFICATE OF SERVICE

On July 24, 2015, I served a copy of People's Response to Defendant's Application for Leave to Appeal by first-class mail addressed to:

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I declare that the statements above are true to the best of my knowledge, information, and belief.

/s/ Lisa Renee Davis
Lisa Renee Davis